NO. 80-1033

IN THE
Supreme Court of the United States

OCTOBER TERM, 1980

BASHARAT JAMIL,

Petitioner,

v.

SOUTHRIDGE COOPERATIVE SECTION 4, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

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QUESTIONS PRESENTED

1. Since the order of the Appellate Division of the State of New York, Second Department, dated July 7, 1980, constitutes the final judgment rendered by the highest court of the State of New York in which a decision could be had herein, is the petition for writ of certiorari filed on or about December 23, 1980 jurisdictionally defective mandating a denial of the petition?

2. Since the petition for writ of certiorari herein fails to comply in whole or in part with Rule 23 of the Revised Rules of the Supreme Court of the United States, should the petition be denied?

3. Since the petition does not come within 28 U.S.C. §1257(3), should the petition be denied?

4. Since the statement of facts set forth in the petition is inaccurate, should the petition be denied?

5. Since the petition raises no question of any import or substance pursuant to 19(1) of the Rules of the Supreme Court of the United States, should the petition be denied in the court's discretion?

6. Since there is no federal question for review, should the petition be denied for lack of jurisdiction?

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OPINIONS BELOW

The Civil Court of the City of New York, Queens County, after trial, rendered a decision on January 17, 1978 granting judgment in favor of petitioner of $2,000 with interest, costs and disbursements. A copy of the decision and judgment appears in Appendix C of the petition, beginning at page 7a. The opinion was reported at 93 Misc. 2d 383; 402 N.Y.S. 2d 292 (1979).

By judgment and order of the Appellate Term for the Second and Eleventh Judicial Districts of the State of New York, dated September 10, 1979, the judgment of the trial court was reversed and the complaint dismissed. A copy of that judgment and order appears in Appendix B of the petition, beginning at page 4a. The opinion was reported at 102 Misc. 2d 404, 425 N.Y.S. 2d 905 (1979).

By unanimous order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, dated July 7, 1980 the order and judgment of the Appellate Term was affirmed. A copy of that order and the opinion upon which it is based appears in Appendix A of the petition beginning at page 1a. The opinion was reported at __Misc. 2d__, 429 N.Y.S. 2d 340 (1980).

By unanimous order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, dated September 15, 1980, the Appellate Division denied petitioner leave to appeal to the Court of Appeals from its order dated July 7, 1980. A copy of that order appears in Appendix D of the petition, on page 14a. The opinion was not reported.

JURISDICTION

The jurisdiction of this court may not be properly invoked herein.

STATUTES INVOLVED

There are no constitutional provisions, treaties, statutes, ordinances and regulations which the case involves.

STATEMENT OF THE CASE

Since the petition for writ of certiorari herein fails to provide the court with a concise statement of the case containing the facts material to consideration of the questions presented, as required pursuant to Rule 23 of the Revised Rules of the Supreme Court of the United States, respondent is constrained to restate the case and facts.

Respondent, Southridge Cooperative Section No. 4, Inc. ("Respondent") is a cooperative housing corporation organized in 1959 under the Cooperative Corporations Law of the State of New York. It is a non-profit corporation whose mortgage is insured by the Federal Housing Administration ("FHA") under §213 of the National Housing Act. Its finances are subject to the approval of the FHA. It is governed by a Board of Directors, elected by the stockholders, all of whom are themselves stockholders.

On or about October 1, 1974 the petitioner, Basharat Jamil ("petitioner") and his wife purchased 307 shares of stock in respondent Cooperative for apartment 2W at 33-44 Junction Blvd., Jackson Heights, New York from the previous owner (not respondent) for a purchase price of $10,250. At the same time, petitioner entered into an Occupancy Agreement with respondent dated October 1, 1974 for his apartment to which was annexed the by-laws and rules and regulations of the Cooperative.

On or about May 1, 1977 petitioner sold his stock to a friend by the name of Singh for the purported sum of $1,800.

Article 8 of the Occupancy Agreement provides in relevant part as follows:

> . . . neither this agreement nor the Member's right of occupancy shall be transferable or assignable except in the same manner as may now or hereafter be provided for the transfer of memberships in the By-Laws of the Corporation.

Article III, §§5(b) and (c) of the By-Laws provides in relevant part as follows:

> §5. *Transfer of Membership.* Except as provided herein, membership shall not be transferable.
>
> (b) *Option of Corporation to Purchase.* If the member desires to leave the project, he shall notify the corporation in writing of such intention and the corporation shall have an option for a period of thirty (30) days thereafter, but not the obligation, to purchase the member's shares of common stock and right of occupancy, at an amount to be determined by the corporation as representing the book value thereof, less any amounts due by the member to the corporation. The purchase by the corporation of the member's stock will immediately terminate the member's right and the member shall forthwith vacate the premises.
>
> (c) *Procedure Where Corporation Does Not Exercise Option.* If the corporation waives in writing its right to purchase the member's stock under the foregoing option, or if the corporation fails to exercise such option within the thirty day period, the member may sell his stock to any person who has been duly approved by the corporation as a member.

These identical restrictions are imprinted on the back of the stock certificate issued by the corporation to petitioner. See Appendix A, p. 1-a.

The Board of Directors of respondent adopted a policy of waiving its option or right of first refusal to purchase shares of stock of outgoing members on condition and in consideration of the payment by the outgoing member to the respondent of a certain sum of money called a waiver of option fee which was based upon apartment size.

At the time petitioner purchased his stock in 1974, the waiver of option fee payable to respondent was $1,000 for his size apartment. The outgoing member who sold his stock to petitioner paid the said $1,000 to respondent as consideration for respondent waiving its option and purchasing his shares. At the time petitioner sold his stock in 1977, the waiver of option fee for his size apartment was $2,000.

There is no requirement for the outgoing member to pay the waiver of option fee to respondent. If the member does not wish to pay the fee, it is the policy of the respondent to exercise its option to purchase the shares of the outgoing member as provided in the by-laws. However, in such circumstance, instead of paying to the outgoing member book value which is zero, which respondent has the right to do, it would pay par value of $5 a share. In petitioner's case, this would have amounted to $1,535.

At the time of the sale of his stock to his friend Singh, petitioner paid respondent the waiver of option fee of $2,000 and respondent delivered a written waiver of its option to purchase his stock in consideration of the $2,000 paid to it. Petitioner then commenced this action against respondent seeking to recover the $2,000.

ARGUMENT FOR DENYING PETITION FOR WRIT OF CERTIORARI

POINT I

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED SINCE IT WAS NOT FILED WITHIN THE TIME REQUIRED BY LAW.

Pursuant to 28 U.S.C. §§2101(c), 1257(3) and Rule 22(3) of the Rules of the Supreme Court of the United States, an application for certiorari, to be reviewable by the United States Supreme Court must (a) be timely made and (b) the judgment sought to be reviewed must be a final one and must also be rendered by the highest court of a state in which a decision could be had. See 32 Am. Jur., 2d, *Federal Practice and Procedure,* §249.

Rule 22(3) of the Revised Rules of the Supreme Court of the United States sets forth the time for petitioning in civil cases when seeking review on certiorari. The courts have held that applications not made within the time prescribed therein will not be allowed. See 32 Am. Jur., 2d, *supra,* §282.

The time prescribed by law is set forth in 28 U.S.C. §2101(c). See Appendix C, page 3-a. That section provides that review shall be taken within *ninety days* after the entry of the judgment or decree.

The petition for writ of certiorari filed by petitioner herein on December 23, 1980 was not filed within the time required by the judicial code and the rules of the Court, and as such should be denied. The unanimous order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department dated July 7, 1980, constitutes the final judgment of the highest court of the State of New York in which a decision could be had. Accordingly, petitioner was obligated to file his petition

for writ of certiorari within ninety days after the entry of the Appellate Division order on July 7, 1980, or on or before October 6, 1980.

28 U.S.C. §1257(3), provides that *only final judgments or decrees rendered by the highest court of a state in which a decision could be had,* may be reviewed by the Supreme Court by writ of certiorari. See Appendix D, page 4-a.

In determining the finality of a state court judgment, local law is material. See 32 Am. Jur., 2d, *supra* §246. Pursuant to the provisions of the N.Y. Civil Practice Law and Rules §5602(b)(2)(i) ("McKinney 1978), ("CPLR") the determination of the Appellate Division was final for purposes of review by the Supreme Court, since under New York State law no further appeal was permissible as a matter of right, and further review was discretionary.

CPLR §5602(b)(2)(i) sets forth the instances in which an appeal may be taken to the Court of Appeals *only by permission of the Appellate Division.* See Appendix E, page 5-a.

Accordingly, petitioner's right of further review from the order of the Appellate Division dated July 7, 1980, was discretionary, and only the Appellate Division could grant petitioner leave to appeal to the Court of Appeals. On September 15, 1980 the Appellate Division refused to grant leave to petitioner for further review.

The courts have held the *judgment of an intermediate appellate court is the judgment of the highest court of the state in which a decision could be had, where state procedure provides only for discretionary review* of the intermediate court's judgment in a higher state court *and such discretionary review has been applied for and denied.* See 32 Am. Jur., 2d, *supra.*, §250.

Accordingly since the petition for writ of certiorari herein was untimely filed on or about December 23,

1980,* *approximately seventy-eight days after the final day permitted by law,* it should be denied.

POINT II

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED SINCE IT FAILS TO COMPLY WITH RULE 23 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

A failure to comply with Rule 23 of the Rules of the Supreme Court of the United States is sufficient ground for denying a petition. See Annot., 32 L.Ed. 2d, 830, §§2.5. See Appendix F, page 6-a.

The petition is defective, in the following respects in that it fails to:

(a) make reference to the official and unofficial reports of the opinions delivered in the Courts below, and if reported, as required under subdivision 1(a);

(b) provide a concise statement of the grounds on which jurisdiction of this court is invoked, showing the statutory provision believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari, as required under subdivision 1(b)(iii);

(c) set forth the constitutional provisions, treaties, statutes, ordinances or regulations which the case involves, as required under subdivision 1(d);

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*By application dated December 11, 1980 petitioner applied for an extension of time to file his petition for writ of certiorari to December 23, 1980, which application was granted by order dated December 15, 1980. Even that application, however, was not timely made since in order to extend petitioner's time it must be presented to the clerk *within the period sought to be extended,* i.e. from July 17, 1980 to October 6, 1980. See 32 American Jurisprudence 2d., supra, §285.

(d) provide a concise statement of the case containing the facts material to consideration of the questions presented, as required under subdivision 1(e). Instead the petition sets forth an excerpt of the decision of the trial court, which decision is totally irrelevant to the facts material in the action;

(e) provide a statement of the case setting forth (i) the manner in which the federal questions sought to be reviewed were raised, the method of raising them and the way in which they were passed upon by the court, and (ii) the specific references to the places in the record where the matter appears, showing that the federal question was timely and properly raised, all as required under subdivision 1(f). The reason the petition fails to comply with this portion of the rule is *that no federal question was raised by petitioner in the court of first instance* and a concocted federal question was only subsequently interjected by petitioner in a vague and flimsy manner on appeal to the Appellate Term, and again reiterated by him on further appeal to the Appellate Division. Consequently, the federal question, if any exists, was neither timely nor properly raised; thus depriving this court of jurisdiction. In point of fact, as Point VI herein shows, this action *does not involve any federal question which may be reviewed by this court, nor was any federal question properly raised by petitioner or passed upon by any of the New York State courts considering the action;*

(f) provide a direct and concise argument amplifying the reasons relied on for the allowance of a writ as provided in 1(h). See Rule 19 of the Rules of the United States Supreme Court.

(g) The contentions in support of the petition are not direct and concise, as required under subdivision 3.

(h) Most significantly, the failure of petitioner to comply with Subdivision 4 requiring him to represent with *accuracy, brevity, and clearness whatever is essential to a*

ready and adequate understanding of the points requiring consideration is sufficient reason, in and of itself for denying the petition. See 32 L.Ed. 2d 830, *supra,* §5 and cases cited thereunder. In point of fact the petition is inaccurate unclear and lengthy. Moreover, petitioner has also improperly annexed to his petition certain exhibits totally irrelevant to the petition herein.

Based upon the foregoing the petition for writ of certiorari shoud be denied herein.

POINT III

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE IT DOES NOT COME WITHIN U.S.C. SECTION 1257(3).

28 U.S.C. §1257(3) sets forth the only instances in which a petition for a writ of certiorari to the United States Supreme Court to review a state court decision will lie. See Appendix D, p. 4-a. Since none of the statutory criteria set forth therein are met in the present case, this court should not entertain jurisdiction to review the unanimous order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department dated July 7, 1980.

The only federal statute referred to in the petition is §213 of the National Housing Act. Petitioner does not challenge the statute, but merely alleges that respondent has not complied with federal by-laws and regulations promulgated pursuant thereto. He sets forth no such regulations. He sets forth FHA model by-law no. 3245 (petition, appendix E, p. 19-a) in support of this contention. Said model by-law is irrelevant, however, as (1) it was not in effect at the time respondent cooperative was created, and was not retroactive, and (2) respondent cooperative did, however, have a by-law containing the same provisions as

said model by-law, which by-law was never amended and remains in full force and effect.

The New York Personal Property Law, which incorporates part of the Uniform Stock Transfer act, is state law. Petitioner argues that the corporate resolution authorizing the cooperative corporation to waive its option to reacquire the stock at book value, in the event of a resale so as to permit a stockholder to sell the stock on the open market upon payment to the corporation of a fee, constitutes the illegal imposition of a fee upon said members. Petitioner contends that the fee is prohibited by FHA model by-law no. 3245 (Petition, Appendix, p. 19-a), which gives the cooperative corporation the first right to buy back the stock of a selling cooperator at book value. This argument has no merit. The by-laws of respondent, by petitioner's own admission, contain the FHA required by-law in question. The by-law has never been amended and is still in full force and effect. The Board of Directors of the respondent merely passed a resolution stating that the respondent would, upon the request of a member, waive its right of first option to purchase the stock upon payment by the seller to the cooperative of a certain sum of money, based upon apartment size, called a waiver of option fee. Whether or not a selling member invoked said resolution, thus enabling him to sell his cooperative stock on the open market, rather than to the respondent at book value, was the voluntary decision solely of that member. Accordingly, no fee was ever "imposed" upon anyone, and no federal "right" ever impinged upon. Since the facts alleged in the petition do not fall within 28 U.S.C. §1257(3), the petition must be denied.

POINT IV

SINCE THE STATEMENT OF FACTS SET FORTH IN THE PETITION FOR WRIT OF CERTIORARI IS INACCURATE, THE PETITION SHOULD BE DISMISSED PURSUANT TO 23(4) OF THE RULES OF THE U.S. SUPREME COURT

Petitioner erroneously states that the stock certificate did not have endorsed thereon a caveat against resale and accordingly, the New York Personal Property Law and the provisions of the Uniform Stock Transfer Act incorporated therein to the effect that all restrictions on the transfer of stock must be set forth on the stock certificate, were violated. Petitioner's statement in inaccurate and misleading.

The stock certificate which was before the Appellate Term (Appendix A, p. 1-a) contains the very restriction against resale urged by petitioner, which, in fact, is similar to FHA §213 model by-law no. 3245 although same is irrelevant, as it was drawn up subsequent to the creation of respondent cooperative.

Additionally, petitioner's argument that a subsequent resolution authorizing the Board of Directors to waive this restriction should also have been endorsed on the stock certificate is without merit. The Appellate Term decision discussed this point rather succinctly. See Petition, Appendix B, p. 6-a.

Pursuant to 23(4) of the Rules of the Supreme Court of the United States (Appendix E, p. 6-a), petitioner's failure to set forth an accurate statement of facts is sufficient reason to deny the petition. See Point II herein.

POINT V

THIS COURT, IN ITS DISCRETION, SHOULD DENY THE PETITION FOR WRIT OF CERTIORARI PURSUANT TO 19(1) OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES, SINCE THE PETITION FAILS TO RAISE ANY QUESTION OF IMPORT OR SUBSTANCE.

Rule 19(1) of the Rules of the United States Supreme Court sets forth certain factors, the absence or existence of wich are to be given strong consideration by this court in determining whether or not to grant a petition for a writ of certiorari (see appendix G, p. 9-a). None of these factors are present in the petition herein.

In the case at bar (a) the state courts were not presented with, nor did they decide any federal question and (b) there are no principles raised in the petition which involves issues of any importance to the public.

Members of cooperatives formed under the National Housing Act will reap no benefit if this court is to consider petitioner's argument that the resolution approving a "waiver of option" fee is invalid, since (i) the invocation of the relief afforded by such resolution is completely optional with the cooperative member, and (ii) the resolution is solely for the benefit of the cooperative membership, since it allows the member to sell his cooperative shares on the open market for a profit if he so desires, rather than forcing him to sell such shares to the cooperative corporation at book value, thus limiting the shareholder to either losing money or breaking even on the sale of the cooperative stock. Accordingly, any attack on said resolution would not benefit the public.

Additionally, the facts giving rise to the present litigation, to wit, where a cooperative member seeks first to

take advantage of the resolution and then subsequently to have it declared illegal, are unique to the present case and of no importance to anyone but petitioner. This court has recognized that certiorari is granted only in cases involving principles, the settlement of which is of importance to the public as distinguished from the parties, and in cases where there is a conflict of opinion and authority between the different Courts of Appeal. *N.L.R.B. v. Pittsburgh S.S. Co.*, 340 U.S. 498, 95. (1951). This court has further stated that certiorari will not be granted where no federal question of substance is presented, or has been decided in a manner that might conflict with applicable decisions of the Supreme Court. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. (1955). See also, 32 Am. Jur., 2d *Federal Practice and Procedure*, §239.

Since none of the factors set forth in Rule 19(1) are present in the petition, this court, in its sound judicial discretion, should deny the petition.

POINT VI

THERE IS NO FEDERAL QUESTION PRESENTED FOR REVIEW. ACCORDINGLY, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

Jurisdiction of the Supreme Court of the United States to review a state court decision depends entirely upon the questions involved. This court has stated that it will not review judgments of state courts which rest upon adequate and independent state grounds or non-federal grounds, and that review of a state court judgment in question is precluded where a decision was based solely upon local law rather than a federal ground. *Henry v. Mississippi,* 379 U.S. 443 (1964).

The decision of both state appellate courts in the present matter were rendered solely upon considerations of state law. The Appellate Term determination (Petitioner's Appendix B, p. 6-a) held that the "waiver of option" fee was a valid exercise of respondent's Board of Directors under applicable state statutes governing cooperative corporations. No mention of any federal question is made in said opinion. The order of the higher Appellate Division (Petition, Appendix A, p. 1-a) affirmed the lower appellate court determination without opinion.

This court has repeatedly held that it will not entertain jurisdiction to review a decision based upon both federal and state grounds, where the state ground is a sufficient basis for the judgment rendered. See *Jankovich v. Indiana Toll Road Com.,* 379 U.S. 487 (1964); *Fay v. Noia,* 372 U.S. 391 (1963).

The petition for writ of certiorari in this matter must be denied since the state appellate courts clearly based their decisions on adequate and independent state grounds rather than on any federal grounds.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A
COPY OF STOCK CERTIFICATE

APPENDIX A—REVERSE SIDE OF STOCK CERTIFICATE (Pages 2a-16a)

SOUTHRIDGE COOPERATIVE, SECTION 4, INC.

ARTICLE VI. CAPITAL STOCK.

The total amount of the authorized capital stock of the Corporation is $342,605.00, consisting of the following:

(a) 20 shares having a par value of $5.00 per share, which shall be designated as "Preferred Stock":

(b) 68,501 shares having a par value of $5.00 per share which shall be designated as "Common Stock", which shares of capital stock shall have the preferences and restrictions as hereafter provided.

Section 1. Provisions of Preferred Stock Power and Authority of Holders Thereof. Subsection 1. Upon insurance by the Commissioner of a certain Mortgage or Deed of Trust (hereinafter called the Mortgage) said Preferred Stock shall be issued to the Federal Housing Administration or to its designated representatives, and delivered to the Federal Housing Commissioner in order that the Commissioner, in connection with the insurance of said Mortgage under the National Housing Act, may regulate and restrict the Corporation as to rents or sales, charges, capital structure, rate of return and methods of operation as provided in this Certificate of Incorporation and to enable the Commissioner to protect the contingent liability of the Federal Housing Administration as insurer of such mortgage. So long as said mortgage insurance shall be in effect, or the mortgage shall be held by the Commissioner, said Preferred Stock shall be held by the

Commissioner or his successors and shall be registered upon the books of the Corporation in the name of the Federal Housing Administration or its nominees. During such period the Corporation shall not be required to recognize any persons other than the Administration, or representatives of the Administration, as the holders of the Preferred Stock.

Subsection 2. The Preferred Stock at any time outstanding may be redeemed by the Corporation at par, provided, however, that such stock shall be so redeemed out of surplus upon, but in no event before, the termination of any contract or mortgage insurance covering any indebtedness of the Corporation by reason of the payment or prepayment of the mortgage indebtedness or the acquisition of title by the Commissioner. Preferred Stock so redeemed shall be retired and cancelled.

Section 2. Rights In Case of Default. In the event of any default by the Corporation, as hereinafter defined, and during the period of such default, the holder or holders of the Preferred Stock, voting as a class and for the purpose of making effective the regulation and restriction set forth in this Certificate of Incorporation, and to protect the interest of the Federal Housing Administration, shall be entitled to remove all existing directors of the Corporation and to elect a new board of directors in their stead, through either of the following procedures;

Subsection 1. The president or the secretary, or either of them as may be required by law, shall, at the request in writing of the holders of record of all of the shares of the Preferred Stock, addressed to him at the office of the Corporation and stating the purpose of the meeting, forthwith call a special meeting, to take place within ten days after such call, of the Preferred Stockholders for the purpose of removal of existing directors and officers, and the election of new directors and officers. If such officer shall fail to issue a call for such meeting within three days after the

receipt of such request, then the holders of a majority of the shares of the Preferred Stock may do so by giving notice as provided by law, or Subsection 2. Notwithstanding either subsections (1) or (2), the holders of the Preferred Stock, may, by waiver of notice or by Ten Days' notice by registered mail given on behalf of the Federal Housing Commissioner, call and hold a meeting in the Office of the Insuring Office of the Federal Housing Administration, in the State of New York.

Subsection 2a. Such meeting may be called pursuant to the statutes of the jurisdiction under which the Corporation was organized.

Subsection 3. At the meeting held pursuant to such notice or call, without regard to whether such call is issued pursuant to the provisions of Subsection 1, 2, 2a or 3 of this Section, the holders of the Preferred Stock shall proceed to elect new directors, any or all of whom may be Preferred Stockholders, but one of whom, at the discretion of the Preferred Stockholders, may be a common stockholder.

Subsection 4. When such default shall have been cured, and the Commissioner shall have so advised the former president or secretary to that effect, and shall have advised either of them that satisfactory evidence has been submitted to the effect that any further defaults of a similar nature will not be permitted again to recur, if within the power of the officers or stockholders to prevent the same, or if there has been no default when the mortgage note has been finally endorsed for the mortgage insurance, then the right again to elect directors of their own choosing shall be vested in the holders of the Common Stock who shall proceed to give notice to the holders of both the Common and the Preferred Stock of their intention to hold a meeting, stating the date and place of such meeting, for the purpose of removing existing directors and electing new directors.

Section 3. Powers, Duties and Rights of Holders of Common Stock. Subsection 1. Except as otherwise provided by law or as set forth in this Certificate of Incorporation, all voting rights shall be vested in the holders of the Common Stock.

Subsection 2. No dividends shall be paid on the Common Stock so long as any Preferred Stock shall be outstanding, except with the consent of the holders of the Preferred Stock.

Section 4. Rights of Dissolution. In the event of any voluntary or involuntary liquidation or dissolution of the Corporation, the holders of the Preferred Stock shall be entitled to receive for each share held, out of the assets of the Corporation available for distribution to its stockholders, whether from capital, surplus or earnings, an amount equal to the par value of each share held, before any distribution of such assets shall be made to the holders of the Common Stock.

ARTICLE VII. REQUIRED RESERVES.

Secton 1. Reserve Fund for Replacements. Commencing on the date of the first payment toward amortization of the principal of the mortgage, unless a later date is approved in writing by the holders of the Preferred Stock, a Reserve Fund for Replacements shall be established and maintained by the Corporation by the allocation thereto of an amount equal to $877.83 and a like amount monthly thereafter. At the election of the Corporation such Fund may be maintained in the form of cash or may be invested in obligations of, or fully guaranteed as to principal and interest by the United States of America. The Fund shall be maintained in a separate account with the mortgagee (or in the case of a deed of trust, with the beneficiary) or under the control of the mortgagee in a safe and responsible depository designated by the mortgagee, and shall at

all times be under the control of the mortgagee. Such Fund, shall be for the purpose of effecting the replacement of structural elements and mechanical equipment of the project and for such other purposes as may be agreed to in writing by the holders of the Preferred Stock. Disbursements from such fund may be made only after receiving the consent in writing of the holders of the Preferred Stock.

Section 2. Operating Reserve. Commencing at occupancy of the project, a general operating reserve shall be established and maintained by allocation and payment thereto monthly of an amount equivalent to not less than 3% of the monthly amount otherwise chargeable to the members pursuant to their occupancy agreements. This reserve shall remain in a special account and may be in the form of a cash deposit or invested in obligations of, or fully guaranteed as to principal and interest by, the United States of America, and shall at all times be under the control of the Corporation. This cumulative reserve is intended to provide a measure of financial stability during period of special stress and may be used to meet deficiencies from time to time as a result of delinquent payment by individual cooperators, to provide funds for the repurchase of stock of withdrawing members and other contingencies. Disbursements totaling in excess of 20% of the total balance in the reserve as of the close of the preceding annual period may not be made during any annual period without the consent of the holders of the Preferred Stock. Reimbursements shall be made to the account upon payment of delinquencies or sale of stock for which funds were withdrawn from the reserve.

ARTICLE VIII. RULES FOR CONDUCT OF AFFAIRS

The following provisions are hereby adopted for the conduct of affairs of the Corporation and in regulation of the powers of the Corporation, the directors and stockholders:

Section 1. Limitations on Alienation. Encumbrances. Remodeling. Occupancy. Changing Corporate Structure. Disposition of Excess Mortgage Funds. The Corporation shall not without prior approval of the holders of the Preferred Stock, given in writing: (a) sell, assign, transfer, dispose of or encumber any real or personal property, except as specifically permitted by the terms of the mortgage; (b) remodel, reconstruct, demolish or subtract from the premises constituting the project and subject to the mortgage; (c) permit the occupancy of any of the dwelling accommodations of the Corporation except at the charges fixed by the schedule of charges provided for hereinafter; (d) permit occupancy of any of the dwelling accommodations of the Corporation except by a tenant-stockholder of the Corporation; (e) consolidate or merge the Corporation into or with any other Corporation; go into voluntary liquidation; carry into effect any plan of reorganization of the Corporation; cancel any of its shares of Preferred Stock, or effect any changes whatsoever in its capital structure, alter or amend this Certificate of Incorporation; or amend its by-laws; (f) fail to establish and maintain the Fund for replacements and general operating reserve as set forth in the Certificate of Incorporation; (g) incur liabilities (direct or contingent) which will at any time ex-

ceed in the aggregate one (1%) per cent of the Federal Housing Administration insured mortgage on the acquired project, except the indebtedness secured by the mortgage or necessary incidents to the execution and delivery thereof; (h) fail to provide for the management of its housing project in a manner approved by the holders of the Preferred Stock; (i) invest any funds of the Corporation in any property, real, personal or mixed, except obligations of, or fully guaranteed as to principal and interest by, the United States of America as provided in this Certificate of Incorporation; (j) encumber or dispose of in any manner whatsoever any funds derived from the proceeds of its insured mortgage in excess of sums required to pay the applicable statutory percentage of the actual cost of legitimate obligations incurred in the construction of the physical improvements on the mortgaged property and for which mortgage funds were made available, nor fail to apply such excess funds to the reduction of the principal due under the insured mortgage.

Section 2. Limitations on Carrying Charges. Monthly carrying charges charged to members during the initial occupancy period shall be made by the Corporation in accordance with a schedule of charges filed with and approved in writing by the holders of the Preferred Stock prior to the opening of the project for occupancy. Such charges shall be in an amount sufficient ot meet the FHA estimate of cooperative management expense, operating expense and maintenance expense, debt service, taxes, special assessments and ground rents, if any reserves and all other expenses of the Corporation. Subsequent to the initial occupancy period, charges made by the Corporation for its accommodations shall be in accordance with a schedule of

charges filed with and approved in writing by the holders of the Preferred Stock and shall be in amounts sufficient to meet the Corporation's estimate of expenses set forth in an operating budget which shall be prepared and submitted to the FHA sixty days prior to the beginning of each fiscal year. The operating budget shall set forth the anticipated income of the project and a sufficiently detailed estimate of expenses which will include separate estimates for administration expense, operating expense, maintenance expense, utilities, hazard insurance, taxes and assessments, ground rent, interest and amortization, mortgage insurance premium, replacement reserve and operating reserve. The Corporation shall not permit occupancy of its accommodations except in accordance with a schedule of charges approved by the holders of the Preferred Stock and such schedule shall not be changed except with the written approval of the Preferred Stockholders; nor shall occupancy be permitted by the Corporation except upon the execution of an occupancy agreement in a form approved by the holders of the Preferred Stock. The property of the Corporation shall not be rented as an entirety. Commercial accommodations and non-dwelling facilities, if any, shall be rented only according to a schedule of charges fixed by the directors and approved in writing by the holders of the Preferred Stock.

Section 3. Limitation on Payments. No compensation or fee shall be paid by the Corporation except for necessary services and except at such rate as is fair and reasonable in the locality for similar services, nor, except with the prior written approval of the holders of the Preferred Stock, shall any compensation be paid by the Corporation to its officers, directors, or stockholders, or to any person, or corporation for supervisory or managerial services; nor shall any compensation be paid by the Corporation to any employee in excess of $4,000 per annum, except with such prior written approval. No

officer, director, stockholder, agent, or employee of the Corporation shall in any manner become indebted to the Corporation, except on account of approved occupancy charges.

Section 4. Maintenance Requirements. The Corporation shall maintain its projec;t, the grounds, buildings and equipment appurtenant thereto, in good repair and in such condition as will preserve the health and safety of its tenants.

Section 5. Requirements as to Corporate Property and Records. The Corporation, its property, equipment, buildings, plans, office apparatus, devices, books, contracts, records, documents and papers shall be subject to inspection and examination by the holders of the Preferred Stock or their duly authorized agent at all reasonable times.

Section 6. Uniform Record System Required. The books and accounts of the Corporation shall be kept in accordance with the Uniform System of Accounting prescribed by the holders of the Preferred Stock. The Corporation shall file with the holders of the Preferred Stock and the mortgagee the following reports verified by the signature of such officers of the Corporation as may be designated and in such form as may be prescribed by the holders of the Preferred Stock—(a) monthly or quarterly operating reports, when required by the holders of the Preferred Stock; (b) semi-annual financial statement within sixty days after the semi-annual period when required by the holders of the Preferred Stock; (c) annual reports prepared by a certified public accountant or other person acceptable to the holders of the Preferred Stock, within sixty days after the end of each fiscal year; (d) specific answers to questions upon which information is desired from time to time relative to the operation and condition of the property and the status of the mortgage; (e) copies of minutes of all stockholders' meetings certified

to by the secretary of the Corporation within sixty days after such meetings, and when required by the holders of the Preferred Stock, copies of minutes of directors' meetings.

Section 7. Limitations Against Racial Restrictions. The Corporation shall not execute or file for record any instrument which imposes a restriction upon the sale, leasing, or occupancy of the property subject to the insured mortgage, or any part thereof, on the basis of race, color or creed.

ARTICLE IX. CONTRACTUAL POWERS

No contract or other transaction between this Corporation and any other corporation, and no act of this Corporation shall in any way be affected or invalidated by the fact that any of the directors or officers of this Corporation are pecuniarily or otherwise interested in, or are directors or officers of, such other corporation; any directors individually, or any firm of which any director may be a member, may be a party to, or may be pecuniarily or otherwise interested in, any contract or transaction of this Corporation, provided the fact that he or such firm is so interested, shall be disclosed on the minutes of this Corporation; and any director of this Corporation who is also a director or officer of such other Corporation or who is so interested may be counted in determining the existence of a quorum at any meeting of the board of directors of this corporation, which shall authorize any such contract or transaction, provided, however, such director may not vote thereat to authorize any such contract or transaction.

ARTICLE X. EVENTS OF DEFAULT.

The happening of any of the following events shall constitute a default within the meaning of that word as us-

ed in the Certificate of Incorporation: (1) the failure of the Corporation to have dismissed within thirty days after commencement of any bankruptcy, recoverable or any petition for reorganization filed by or against the Corporation under the provisions of any State insolvency law or under the provisions of the Bankruptcy Act of 1898, as amended, or upon the making by the Corporation of an assignment for the benefit of its creditors, unless said action is previously approved in writing by the holders of the Preferred Stock; (2) the failure of the Corporation to pay the principal, interest, or any other payment does on any note, bond, or other obligation executed by it, as called for by the terms of such instrument; (3) the failure of the Corporation to establish and maintain the Reserve Fund for Replacements and general operating reseve as provided in Article VII hereof or the use of such reserve except as permitted in said Article; (4) execution or filing for record by the Corporation of any instrument which imposes a restriction upon sale, leasing or occupancy of the property subject to the mortgage or any part thereof, on the basis of race, color or creed; (5) the violations of any of the terms of this Certificate of Incorporation, or the failure of the Corporation to perform any of the covenants, conditions or provisions required by it to be performed by the Certificate, the By-Laws of the Corporation, the Mortgage, or any contract to which the Corporation and the Commissioner shall be parties, or the failure to carry out in full the terms of any agreement whereby the loan covered by the Mortgage is to be advanced or the project is to be constructed and operated; (6) the attempt by the Corporation, its officers, directors or stockholders to accomplish by indirect methods that which they are not permitted by the terms hereof to do directly; (7) the failure of the Corporation to report to the holders of the Preferred Stock any changes in its officers and directors or in its official address to which mail is to be directed or notices sent.

EXCERPTS OF BY-LAWS

ARTICLE III—Section 5. Transfer of Membership. Except as provided herein, membership shall not be transferable.

(a) Death of Member. If, upon death of a member, his stock in the corporation passes by will or intestate distribution to a member of his immediate family, such legatee or distributee may, by assuming in writing the terms of the Subscription Agreement, and Occupancy Agreement within sixty (60) days after member's death, and paying all amounts due thereunder, become a member of the corporation. If member dies and an obligation is not assumed in accordance with the foregoing, then the corporation shall have an option to purchase the stock from the deceased member's estate in the manner provided in paragraph (b) of the Section, written notice of the death being equivalent to notice of intention to withdraw. If the corporation does not exercise such option the provisions of paragraph (c) of this Section shall be applicable, the references to "member" therein to be construed as references to the legal representative of the deceased member.

(b) Option of Corporation to Purchase. If the member desires to leave the project, he shall notify the corporation in writing of such intention and the corporation shall have an option for a period of thirty (30) days thereafter, but not the obligation, to purchase the member's shares of common stock and right of occupancy, at an amount to be determined by the corporation as representing the book value thereof, less any amounts due by the member to the corporation. The purchase by the corporation of the member's stock will immediately terminate the member's rights and the member shall forthwith vacate the premises.

(c) Procedure Where Corporation Does Not Exercise Option. If the corporation rejects in writing its right to purchase the member's stock under the foregoing option, or if the corporation fails to exercise such option within the thirty day period, the member may sell his stock to any person who has been duly approved by the corporation as a member.

Section 6. Termination of Membership. In the event the corporation has, pursuant to the provisions of the Occupancy Agreement, terminated the rights of a member under said Occupancy Agreement and repossessed the dwelling unit, the member shall be required to deliver promptly to the corporation his share or shares of stock and his Occupancy Agreement, both endorsed in such manner as may be required by the corporation. The corporation shall thereupon at its election either (1) repurchase said stock at its book value as determined by the corporation, or (2) proceed with reasonable diligence to effect a sale of the member's rights under such share or shares of stock to a purchaser and at a sales price acceptable to the corporation. The retiring member shall be entitled to receive the book value (if the corporation has exercised election (1) above) or the sales price (if the corporation has exercised (2) above) but in either case less the following amounts (the determination of such amounts by the corporation to be conclusive); (a) any amounts due to the corporation from the member under the Occupancy Agreement; (b) the cost of estimated cost of all deferred maintenance, including painting, redecorating, floor finishig, and such repairs and replacements as are deemed necessary by the corporation to place the dwelling unit in suitable condition for another occupant; and (c) legal and other expenses incurred by the corporation in connection with the default of such member and the resale of his stock.

ARTICLE IV—Section 7. Voting. At every meeting of the members, each member present, in person, shall have the right to cast one vote on eaach question and never

more than one vote, without regard to the amount of shares of stock standing in the name of the member on the books of the corporation. The vote of the majority of those present, in person, shall decide any question brought before such meeting, unless the question is one upon which, by express provision of statute or of the Certificate of Incorporation or of these By-Laws, a different vote is required, in which case such express provision shall govern and control.

ARTICLE VII—Section 3. Book Value. Whenever the corporation elects to purchase the stock of a member as set forth in Article III, Sections 5 and 6 of these By-Laws, the term "book value" shall be understood to mean the proportionate amount of the net worth of the corporation attributable to such holdings as of a given date. For the purposes of this computation, net worth consists of the share capital paid in by the members as increased or diminished by the reserve or surplus accounts listed under the capital account classification on the most recent balance sheet prepared in accordance with the FHA Uniform System of Accounts.

Section 5. Transfer of Stock. No transfer of stock shall be made upon the books of the corporation within ten days next preceding the annual meeting of the stockholders.

Section 5a. Transfer of Stock. Any transfer or stock offered to the corporation for resale, shall be offered in the following order of preference by the Directors: 1—Resale to a member of the stockholder's immediate family currently living with the family. 2—Resale to a member of stockholder's family limited to: parents, children, aunt, uncle, brother, sister, nephew or niece. 3—Stockholder transferring from one apartment to another. 4—Recommendation by the Board of Directors. 5—Recommendation by stockholders. 6—Names drawn from a list of qualified applicants in order of their receipt.

All applications for consent to transfer to be made in writing and deposited with the Board of Directors, not less than 10 days before the annual meeting of stockholders.

Section 6. Lien. The corporation shall have a lien on the shares of the outstanding common stock in order to secure payment of any sums which shall be due or become due from the holders thereof for any reason whatsoever, including any sums due under any occupancy agreement.

ARTICLE VIII—ISSUANCE OF SPECIAL STOCK TO FHA—Section 1. Rights of Preferred Stockholders. The rights and privileges of the common stock of the corporation and the management, operation and control of the affairs of the corporation shall be subject to the rights, powers and privileges of the preferred stock of the corporation registered in the name of the Federal Housing Administration as provided in the Certificate of Incorporation.

APPENDIX B

Rule 22. Review on Certiorari—Time for Petitioning

3. A petition for writ of certiorari in all other cases shall be deemed in time when it is filed with the clerk within the time prescribed by law.

APPENDIX C

§2101. Supreme Court; time for appeal or certiorari; docketing; stay

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

APPENDIX D

§1257. State courts: appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

APPENDIX E

§5602. Appeals to the court of appeals by permission.

(b) Permission of Appellate Division. An appeal may be taken to the court of appeals by permission of the Appellate Division:

2. in an action originating in a court other than the Supreme Court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency,

(i) from an order of the Appellate Division which finally determines the action, and which is not appealable as of right pursuant to paragraph one of subdivision (b) of §5601 . . .

APPENDIX F

Rule 23. The Petition for Certiorari

1. The petition for writ of certiorari *shall contain in the order here indicated—*

(a) A reference to the official and unofficial reports of the opinions delivered in the courts below, if any, and if reported. Any such opinions shall be appended as provided in subparagraph (i) hereof.

(b) A concise statement of the grounds on which the jurisdiction of this court is invoked, showing:

(i) The date of the judgment or decree sought to be reviewed, and the time of its entry;

(ii) The date of any order respecting a rehearing, and the date and terms of any order granting an extension of time within which to petition for certiorari; and

(iii) The statutory provision believed to confer on this court jurisdiction to review the judgment or decree in question by writ of certiorari.

(c) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition or fairly comprised therein will be considered by the court.

(d) The constitutional provisions, treaties, statutes, ordinances, or regulations which the case involves, setting them out verbatim, and citing the volume and page where they may be found in the official edition. If the provisions involved are lengthy, their citation alone will suffice at this point, and their pertinent text shall be set forth in an appendix.

(e) A concise statement of the case containing the facts material to consideration of the questions presented.

(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the Appellate Court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari. Where the portions of the record relied upon under this subparagraph are voluminous, then they shall be included in an appendix to the petition, which may, if more convenient, be separately presented.

(g) If review of the judgment of a federal court is sought, the statement of the case shall also show the basis for federal jurisdiction in the court of first instance.

(h) A direct and concise argument amplifying the reasons relied on for the allowance of the writ. See Rule 19.

(i) There shall be appended to the petition a copy of any opinions delivered upon the rendering of the judgment or decree sought to be reviewed, including all opinions of courts or administrative agencies in the case, and, if reference thereto is necessary to ascertain the grounds of the judgment or decree, opinions in companion cases. The opinions shall include the caption showing the name of the court or agency issuing the same and the title and numbers of the case and the date of their entry. If whatever is required by this paragraph to be appended to the petition is voluminous, it may, if more convenient, be separately presented.

(j) If review of the judgment or decree of a state court is sought, there shall also be appended to the petition a copy of the judgment or decree in question and any order on rehearing; and, if review of the judgment or decree of a federal court is sought, there shall similarly be appended a copy of such judgment or decree and any order on rehearing which may however be limited to the portions thereof ought to be reviewed. The judgments, decreed, or orders on rehearing shall include the caption showing the name of the court issuing the same, the title and number of the case, and the date of entry of such judgment, decree and order.

2. The petition for writ of certiorari shall be printed in conformity with Rule 39.

3. All contentions in support of a petition for writ of certiorari shall be set forth in the body of the petition, as provided in subparagraph (h) of paragraph 1 of this rule. No separate brief in support of a petition for writ of certiorari will be received, and the clerk will refuse to file any petition for writ of certiorari to which is annexed or appended any supporting brief.

4. The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition.

5. Where several cases are sought to be reviewed on certiorari to the same court that involve identical or closely related questions, it shall suffice to file a single petition for writ of certiorari covering all the cases.

APPENDIX G

Rule 19. Considerations Governing Review on Certiorari

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by

this court; or has decided a federal question in a way in conflict with application decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or as far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.